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Enforcing Title IX

A Report of the United States Commission on Civil Rights

October 1980

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U.S. COMMISSION ON CIVIL RIGHTS

The U.S. Commission on Civil Rights is a temporary, independent, bipartisan agency established by Congress in 1957 and directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, sex, age, handicap, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to discrimination or the denial of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information in respect to discrimination or denials of equal protection of the laws because of race, color, religion, sex, age, handicap, or national origin;
- Submit reports, findings, and recommendations to the President and the Congress.

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ENFORCING TITLE IX

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INTRODUCTION

Eight years ago Congress passed Title IX of the Education Amendments of 1972, prohibiting, with certain exceptions, discrimination on the basis of sex in any education program or activity that receives Federal financial assistance.[1] Congressional debate on the Title IX bill reflected an awareness that opportunity for women was restricted throughout American education and, further, that denying women equal educational opportunity also denies them equal opportunity in employment. In introducing the bill, Senator Birch Bayh stressed the link between discrimination in education and employment:

> The field of education is just one of many areas where differential treatment [between men and women] has been documented, but because education provides access to jobs and financial security, discrimination here is doubly destructive for women. Therefore, a strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.[2]

Economic inequities noted during congressional debate over Title IX[3] have not substantially diminished. Women's earning power relative to men's,

for example, was nearly as low in 1977 as in 1939, largely because women remained concentrated in relatively few sex-stereotyped occupations.[4] The Nation's schools have contributed to the persistence of women's economic disadvantage by encouraging girls to prepare for only a limited range of occupations outside the home.[5]

One major goal of Title IX is to eliminate educational practices that tend to steer students into vocations according to their sex. A new report for the U.S. Office of Education (OE) found that change towards increased enrollment of students in programs not traditional for their sex has been very slow and that there has been only "mixed" progress by schools in implementing Title IX. The report concluded:

> Some states and schools have been moving ahead to equalize opportunities for the sexes in classroom and extracurricular activities, and in sports and employment. Some have moved in only one or two of these areas, and some seem to have moved not at all.[6]

Another recent report for OE found that most of the schools studied were not in full compliance with Title IX and were exerting only minimal efforts to comply, partially because they had not received adequate

information regarding their obligations or guidelines for implementing the basic requirements of the Title IX regulations and considered sanctions for noncompliance "no serious threat."[7]

Agencies that extend Federal financial assistance to educational institutions or programs are responsible for enforcing Title IX by issuing regulations prohibiting sex discrimination by their recipients,[8] and they may terminate or refuse to extend financial assistance for failure of a recipient to comply.[9] Approximately 20 Federal agencies have this responsibility for enforcing Title IX.[10] However, because it assists virtually every educational institution in the Nation,[11] the Department of Health, Education, and Welfare (HEW) has had principal responsibility for Title IX enforcement.[12]

Continual criticism has been leveled at HEW's enforcement effort. In 1974 the Women's Equity Action League (WEAL), joined by other organizations and individuals, filed suit against HEW for failure to enforce Executive orders and statutes, including Title IX, that prohibit discrimination on the basis of sex in educational institutions and programs receiving Federal

funds.[13] In 1975 this Commission criticized HEW for its long delay in publishing final Title IX regulations, observing that the Department's Office for Civil Rights (OCR) had thereby "effectively nullified the intent of the Congress."[14] A 1976 study by the Project on Equal Education Rights (PEER) concluded that HEW's enforcement efforts to that date had been "negligible,"[15] and another study completed that year found that HEW had failed to set "clear and consistent policies and enforce them to implement Title IX."[16] In 1977 the U.S. District Court for the District of Columbia, in approving a settlement of the WEAL suit and two other cases involving HEW's civil rights enforcement practices, issued an order setting time frames for processing complaints and eliminating the complaint backlog and specifying the number of sex discrimination complaints to be processed and Title IX compliance reviews to be conducted the following year. Commonly known as the Adams order after another case it settled, the order noted in the preamble that if OCR staff were not further increased, compliance would require substantially increased efficiency.[17] In June 1979 the Director of OCR, noting the success of the

WEAL suit, agreed that HEW's Title IX enforcement efforts had not been "very widespread or energetic" under his predecessors. He said:

> The failure of the federal government to mount an effective Title IX compliance compaign did a grave disservice to the victims of discrimination who filed complaints, and it left a legacy of public ignorance about the law and about the severity of unequal treatment...in 1977, the Department's Office for Civil Rights inherited that legacy.[18]

The Director asserted that the administration that took office in 1977 had committed the Department to an "aggressive" enforcement program, and he cited increased enforcement activities and significant improvements in OCR organization, staffing, and productivity.[19] Such improvements have increased the prospects of a timely resolution of complaints of discrimination in most areas covered by Title IX. Nevertheless, in November 1979 OCR acknowledged that it had not complied fully with the Title IX requirements of the Adams order, having failed to resolve policy in three critical areas or devote sufficient staff resources to compliance reviews.[20]

In May 1980 principal Title IX enforcement responsibility passed from HEW to the new Department of

Education (ED),[21] and approximately two-thirds of the OCR staff, together with the basic enforcement processes used in HEW, were transferred to the new Department. In accordance with its jurisdiction over discrimination on the basis of sex and its responsibility for evaluating Federal enforcement of civil rights laws, the Commission has prepared this brief report to reassess for ED OCR's Title IX enforcement effort and, where appropriate, to offer recommendations. The report is based on the results of a comprehensive self-administered questionnaire sent by this Commission to HEW in December 1979,[22] analysis of other materials provided by HEW, and interviews with HEW and other Federal agency officials and representatives of private groups with a continuing interest in Title IX enforcement.

I. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, OFFICE FOR CIVIL RIGHTS

Approximately 20,000 school districts and higher education institutions receive financial assistance from programs administered until recently by HEW and now by ED. The Office for Civil Rights (OCR) is responsible for monitoring and enforcing their compliance with Title IX, as well as with other civil rights laws under the Department's jurisdiction.

ORGANIZATION

OCR consists of a headquarters unit in Washington, D.C., and 10 regional offices. The headquarters unit is responsible for developing policies and procedures, supervising and guiding the regional offices to ensure that policies and procedures are applied correctly and uniformly, and initiating enforcement actions. The headquarters unit also conducts research and provides administrative and program guidance and technical assistance as required by the regional offices.[23] The regional offices are responsible for conducting complaint investigations and compliance reviews

performing other activities to determine compliance, negotiating voluntary compliance, providing technical assistance for corrective actions, monitoring the implementation of corrective plans, and recommending cases for enforcement action. Each regional office has divisions for major categories of recipients, a management division, and a civil rights attorney division, which participates in all phases of the complaint and compliance review process.[24]

STAFFING

Between December 1977, when the Adams order was issued, and the end of fiscal 1979, OCR staff increased from 971 to 1,679.[25] This substantial increase was authorized as a direct result of the Adams order, but fell 190 positions short of the number anticipated in the Adams order as necessary for the agency to fulfill its enforcement responsibilities.[26] Of this total, at least 1,468 positions had some responsibility for Title IX enforcement in fiscal 1979.[27] As of January 31, 1980, OCR reported a staff of 1,592, its departmental staffing ceiling having been reduced to correct a Department-wide overallocation of staff.[28] As of the

same date, OCR reported 180 vacancies, most located in OCR headquarters and in the Chicago regional office.[29] Headquarters vacancies were concentrated in the Office of Compliance and Enforcement. There was, thus, a significant staff shortage in the office responsible for guiding, coordinating, and monitoring enforcement activities in the regions.[30]

Staff are not assigned exclusively to any one enforcement program, nor is the proportion of time they spend on each program fixed. The increase in staff size since the Adams order thus does not provide a precise measure of OCR's increased commitment to Title IX enforcement.[31] The 1981 budget request lists 352 "staff resources" or person-year equivalents for Title IX, including 203 "resources" for compliance reviews and 84 for complaints.[32] However, in the absence of procedures to set and monitor staff time spent on each enforcement program, these figures are estimates at best.

TRAINING

Training is the standard method used to assure that regional staff conduct complaint investigations,

compliance reviews, and negotiations according to established departmental policies and procedures.

OCR provided very little staff training to develop expertise in Title IX enforcement before 1978.[33] Training increased in 1978 and 1979.[34] Data supplied by OCR do not indicate whether this training was sufficient to assure that all staff responsible for handling Title IX cases have the requisite expertise in special Title IX policies and compliance problems, such as analysis of employment complaints and application of the intercollegiate athletics policy to interscholastic and intramural sports.

Two hundred and fifty staff (about 17 percent of the approximately 1,400 with some Title IX responsibility) have received some Title IX training since July 1978.[35] These include 56 attorneys who received training in the Title IX statute, the HEW Title IX regulations, major policy areas, and enforcement procedures.[36] More recently, regional directors, postsecondary division heads, and approximately 55 equal opportunity specialists received training in the newly issued Title IX intercollegiate athletics policy, including use of a draft athletics

manual designed to provide guidance to regional investigators.[37] This latter training and the draft manual are steps to expedite the processing of the athletics complaints that accumulated while issuance of the policy interpretation setting guidelines for compliance in intercollegiate athletics programs was pending. Further training in this area was planned prior to the initiation of reviews of intercollegiate athletics programs.[38] However, after the first training sessions, the Office of the General Counsel decided to rewrite the draft manual, and training was suspended pending its completion. Further delays resulted from the transfer of Title IX responsibilities to ED. In July 1980, 3 months before most intercollegiate athletics complaints were originally scheduled for resolution, OCR decided to proceed with reviews using the manual in draft and incorporating training into the actual review process. The backlog of athletics complaints is now scheduled for elimination by the end of July 1981.[39]

II. TITLE IX ENFORCEMENT PROGRAM

To monitor compliance and its own enforcement efforts and to develop enforcement plans, OCR collects and analyzes data from recipients and its regional offices. The agency uses two principal mechanisms to detect violations of the civil rights laws under its jurisdiction: complaints filed by individuals or groups and compliance reviews of recipient programs selected according to its own priorities. When it identifies a violation, it is obligated to seek voluntary compliance through negotiations. If negotiations fail, the Department may initiate proceedings to terminate its financial assistance or use other means of enforcement authorized by law, including referral of the case to the Department of Justice (DOJ) for prosecution.[40]

DATA COLLECTION AND ANALYSIS

In a 1977 report requested by Senator Bayh, the U.S. Comptroller General concluded that OCR did not have a management information system capable of providing "the type of data that would be essential for

effective administration and management of OCR's Federal civil rights responsibilities."[41] During the last 3 years much effort has been devoted to setting up more adequate data management systems, and these have been adopted by ED. The "case following system" criticized by GAO has been replaced by the "case information management system," a more reliable tool for tracking cases, monitoring adherence to the schedule required by the Adams order, and performing certain types of analyses--for example, analyses of the incidence of violations alleged by complainants or found in compliance reviews. Nevertheless, data necessary for effective Title IX enforcement were still inaccessible at the end of 1979, partly because the system was entirely manual during most of the period covered by this study and partly because the system cannot generate all necessary data, including data on some items cited by the Comptroller General.[42] For example, OCR was unable to provide this Commission with:

- The number of Title IX complaints received according to subject of complaint (area of alleged

discrimination), type of complaint (class or individual), or gender of complainant for fiscal 1979;

- The number of complaints awaiting investigation and letters of findings at the outset of each fiscal year from 1977 through 1979 or the number of complaints awaiting policy decision at the outset of fiscal years 1977 and 1978;
- The number of complaints in which Title IX deficiencies, problems, or violations were not resolved in fiscal years 1977 through 1979; or
- A list of institutions found in noncompliance with Title IX since fiscal 1977.

According to the director of HEW's OCR, her office would have had "to examine each Title IX case individually to obtain the requested data."[43] For the years in question, therefore, OCR could not and cannot develop a profile of Title IX compliance problems and enforcement without a major diversion of staff resources.[44]

Automation of complaint investigation data is sufficiently complete for OCR to be able to respond to the first three items above for fiscal 1980 and future years. However, not all data necessary to evaluate the

complaint investigation process or the performance of investigators have been automated.[45] Automation of compliance review data has not begun and will not be completed for a year or two.[46] Analyses of the incidence of noncompliance and the performance of investigative units will remain partial during this period unless each compliance review report is examined individually.

Even when scheduled automation is completed, serious deficiencies in data management apparently will remain. Automation will not change the fact that data are not tabulated in such a way as to permit identification of all institutions found in violation of Title IX, all Title IX violations found, final disposition of cases referred, or the precise results of OCR enforcement activities. Further, the agency will remain unable to specify the types and numbers of remedies that are implemented to resolve complaints[47] and thus unable to ascertain whether they are adequate to resolve all the compliance problems found. "Case disposition reports," which describe all closures involving change, include information on types of

remedies, but they are not analyzed, and not all regions file "case disposition reports" as required.[48]

In September 1979, OCR instituted a new quality assurance project. Under the new system, reviewers at headquarters analyze approximately 30 percent of each region's closed cases, scoring them according to standards set for each of 37 steps (or "items") in the complaint investigation and compliance review processes. Cases in which reviewers identify erroneous closure decisions or critical deficiencies in procedure are remanded to the region for reopening. However, the principal purpose of the system is to isolate systemic problems in implementing the different steps of the investigative process. At present the system does not identify problems by issue or enforcement program and, therefore, cannot serve to evaluate Title IX enforcement in particular. There are plans to augment the system, which ED has adopted, so that data will be tabulated by issue and enforcement program as well as item.[49] Then OCR will be able to identify systematically any need for special measures to assure that procedures are implemented as correctly in the Title IX enforcement program as in the others.

To target compliance reviews, OCR analyzes biennial survey data collected from recipients. Surveys of local education agencies include items in approximately a dozen major categories, including some added principally to assess compliance with Title IX.[50] By contrast, data are collected from postsecondary institutions on only two items, both included in a survey conducted by the National Center for Education Statistics (NCES). These items are composition of the student body and distribution of degrees earned. No data are collected that could indicate possible discrimination in financial aid, student employment, nondegree-granting programs such as intercollegiate athletics, or services such as guidance and counseling, placement, health, and housing. Data from complaint investigations, which would include allegations of discrimination in these areas, are apparently not used in preparing the analyses upon which the annual operating plan for compliance reviews is based, although 42 percent of the complaints on hand at the beginning of fiscal 1980 involved institutions of higher education.[51]

COMPLAINT PROCESSING

OCR's failure to resolve Title IX complaints promptly was a primary stimulus for the WEAL suit and the resulting Adams order. In 1979 OCR reduced the number of complaints on hand at the beginning of the fiscal year. There were 576 on hand at the beginning of fiscal 1980 as compared to 1,187 at the beginning of fiscal 1979, 1,124 at the beginning of fiscal 1978, and 865 at the beginning of fiscal 1977.[52] A decrease in the number of Title IX complaints received accounts in part for this reduction.[53] Nevertheless, the rate at which OCR processes complaints has demonstrably improved. The number of Title IX complaints closed increased from 237 in 1976 to 1,611 in 1979. Moreover, the productivity of investigators increased from 4.4 cases closed in 1977 to 12.5 closed in 1979, with no overall decline in the percentage of cases in which relief was obtained.[54] As noted, the productivity of investigators during the first 9 months of fiscal 1980 never rose above an average of 6.2 cases closed and stood at 5.8 cases closed as of June 30.[55] By OCR estimates, full compliance with the Adams order would

require that investigators each close an average of 18 cases a year.[56]

Despite the overall increase in efficiency, in fiscal 1979 an average of 1 year and 5 months (515 days) elapsed between receipt and closure of a Title IX complaint.[57] Sixty percent of the cases pending at the beginning of fiscal 1980 had been in the agency for more than a year.[58] These figures reflect principally the fact that processing had been suspended in three major categories of cases: those involving intercollegiate athletics, rules of appearance, and employment. The November 2, 1979, affidavit filed under Adams explained that OCR had failed to comply with the court-ordered schedule for processing complaints because it had not completed policy development in the first two areas and was blocked by court orders in the third.[59] Pending policy clarifications, all intercollegiate athletics and rules of appearance complaints were held in abeyance, and regional offices were instructed to process only those employment complaints involving programs funded to provide employment or in which the alleged discrimination could adversely affect students (those

that OCR believes it can process under subpart D of the Title IX regulations).[60] The remainder were to be held until the Supreme Court ruled on three cases testing HEW's authority to regulate employment under Title IX.[61] The Adams affidavit reported that OCR was negotiating a memorandum of understanding with the Equal Employment Opportunity Commission (EEOC) to accept referrals of employment complaints that OCR could not currently investigate,[62] although EEOC had earlier declined to negotiate pending completion of a government-wide rule on the issue and indicated that many complaints were already untimely under its procedural requirements, rendering prosecution to enforce compliance unfeasible. As of August 14, 1980, the rule had not been completed, and no memorandum of understanding was being negotiated.[63]

On November 26, 1979, the Supreme Court denied certiorari in the three employment cases and thereby left in force decisions by the first, sixth, and eighth circuit courts that generally invalidate the subpart of the Title IX regulations on employment practices (subpart E).[64] OCR regional offices were then instructed by the director to close employment cases

from persons in States covered by the three courts, but only after determining whether they might be processed under subpart D, which covers nondiscrimination in education programs and activities.[65] Cases from persons in States not covered by the appellate courts were to continue to be processed if they fell under subpart D or if the principal purpose of the Federal funds received by the institution was to provide employment.[66]

Despite these amended instructions, the National Education Association (NEA) has reported to this Commission that the majority of employment cases it reviewed were closed without an analysis to determine whether they could be processed under subpart D. NEA also reported that in the few cases that were so analyzed, the construction of subpart D was unnecessarily narrow and that investigators had often closed employment cases without investigating all allegations.[67] Another organization that reviewed Title IX employment cases has reported that some were closed despite evidence in the files of probable violations and that OCR headquarters officials acknowledged that the closures were improper.[68]

In June and July 1980, the fifth and ninth circuit courts also ruled the subpart E regulations invalid, while the second circuit court upheld them.[69] As of August 1980, OCR was still holding all subpart E complaints.[70] It could not specify the number of employment complaints or the categories of alleged discrimination involved, and as noted, no memorandum of understanding with EEOC was being negotiated.[71] OCR regional offices have been instructed to inform complainants alleging individual discrimination in employment of their right also to file under Title VII within the 180-day period set by both Title IX and EEOC regulations.[72]

Policy clarifications on intercollegiate athletics and rules of appearance were published at the close of 1979, both after considerable delay.[73] The need for the former had been recognized during the 3-year transition period that higher education institutions had been given to bring their intercollegiate athletics programs into compliance with the Title IX regulations. However, development of a policy interpretation did not begin until the transition period ended in July 1978.[74] Owing in part to controversy surrounding the proposed

interpretation published in December 1978,[75] nearly another year elapsed before the final interpretation was published in December 1979. At that time OCR was holding 119 athletics complaints affecting 77 institutions, the earliest dating back to 1972.[76] As of August 1980, the backlog had increased to 124 complaints affecting 80 institutions.[77] The agency reports that these will be resolved in the context of compliance reviews. As noted, all but six of the reviews were originally scheduled for completion by the end of fiscal 1980.[78] The new enforcement plan calls for completion of all reviews by the end of July 1981, with letters of findings from the first eight reviews to be issued in late January 1981.[79]

In December 1978, HEW also published a proposed revocation of the provisions of the Title IX regulations governing rules of appearance.[80] February 20, 1979, was set as the deadline for public comment. The proposed revocation was withdrawn on November 20, 1979, effectively reaffirming the provisions still in force, but providing no further clarification of the Department's policy.[81] In the interim, no complaints involving rules of appearance were processed. OCR

reports that all 66 such complaints on hand at the beginning of fiscal 1980 will be resolved within a year.[82]

Case closures are logged as "change" when the resolution results in the complainant's receiving "some type of benefit," or remedy.[83] As noted, OCR cannot specify remedies achieved. Change was recorded as the reason for closure in 22 percent of Title IX cases in 1977, 35 percent in 1978, and 30 percent in 1979,[84] a minimum of 16 percentage points below the average of cases closed with change in all OCR enforcement programs combined.[85] As noted, the case information management system does not readily provide the data necessary to determine the percentage of cases in which OCR's own enforcement efforts resulted in benefit to the complainant.

COMPLIANCE REVIEWS

HEW has found that compliance reviews result in change over twice as often as complaint investigations and affect an average of six times as many people.[86] Nevertheless, between 1977 and 1979 OCR completed very few compliance reviews, ultimately failing, as it

acknowledged, to comply with the Adams consent decree.[87] In 1978, 14 Title IX compliance reviews were planned, but only 5 completed, with 2 resulting in change through voluntary resolution. In 1979, 77 Title IX reviews were planned and 24 completed, with 6 resulting in change through voluntary resolution.[88] OCR attributes this low completion rate in part to the demands on staff time made by backlogged complaints.[89]

The revised FY 1980 annual operating plan for education compliance reviews shows 256 reviews scheduled.[90] Of these, 168 were to include at least some programs and practices covered by Title IX, and these were to be focused upon areas in which compliance problems appear concentrated.[91] Forty-eight were to be reviews of intercollegiate athletics programs and facilities. As noted, none of these will be completed by the end of the fiscal year. One hundred and twenty were to combine reviews of compliance with provisions of Title VI, Title IX, and section 504. Of these 120 multijurisdictional reviews, 26 were to focus on vocational education programs and home economics and industrial arts courses, and an additional 26 were to

focus on admissions to graduate and professional schools.[92]

The marked increase in compliance reviews scheduled reflects in part an anticipated reduction in the proportion of staff resources required to handle complaints. As noted, OCR maintains that it was unable to adhere to the court-ordered compliance review schedule because of delays in hiring and training staff and a need to divert staff resources to backlogged complaints.[93] It now plans to resolve most of the pending athletics complaints in the context of compliance reviews.[94] Thus, the agency's compliance review plans represent a promising shift in priorities. However, at the beginning of April 1980, halfway through the fiscal year, only one region had begun fiscal 1980 compliance reviews. The other regions were still conducting reviews carried over from 1979.[95]

ENFORCEMENT PROCEDURES

As noted, OCR is obligated to seek voluntary compliance when it identifies a violation of Title IX. Should attempts to secure voluntary compliance fail, it may initiate administrative proceedings to terminate

Federal financial assistance or use other means authorized by law, including referral of the case to the Department of Justice (DOJ).[96] OCR reports that 98 percent of Title IX cases in which probable violations are found are ultimately resolved by voluntary compliance.[97] However, as noted, OCR data do not permit identification of the number of such cases, the percentage of all cases that they represent, or the nature of the remedy agreed upon. The source of the above figure, therefore, cannot be ascertained. It also is not possible to ascertain the average time that elapses between findings of violations and voluntary resolutions. In the 8 years since Title IX was passed, OCR has issued 33 notifications of intent to initiate adminstrative proceedings to terminate funds, none since 1978.[98] It has actually proceeded to hearings in only a few cases.[99] The agency notes that in all these cases action has been enjoined by the courts.[100] Since these cases directly or indirectly involved enforcement of subpart E,[101] it is not clear whether the courts would enjoin termination of funds for noncompliance with other provisions of the Title IX regulations. More generally, it is not possible to determine on the

basis of data available whether OCR has attempted to use administrative sanctions in all cases in which negotiations did not promptly achieve voluntary compliance.

Authorities in civil rights enforcement and Title IX, including this Commission, have affirmed the efficacy of administrative proceedings in enforcing equal opportunity in education and, when the sanction is credible, in inducing voluntary compliance.[102] Moreover, in a previous study this Commission found that when OCR staff and recipient institutions knew that sanctions would not be imposed, the former pressed for only compromise positions rather than full compliance.[103] Accordingly, it is significant that, as noted, a group studying Title IX compliance was recently advised that local education agencies and institutions do not regard fund termination as a serious threat.[104]

Instead of instituting proceedings to terminate funds, OCR can refer cases in which violations have been found to the Department of Justice (DOJ) for action in the courts. Successful suits filed by DOJ can result in a variety of remedies and sometimes in

faster relief than that afforded by administrative proceedings.[105] They also establish a body of case law that can be used to defend an agency's enforcement authority against subsequent challenges.[106] A total of five Title IX cases have been referred to DOJ, all in the latter half of 1978. All involved employment, and DOJ declined to take action on any of them.[107]

OCR notes that it does not have the authority to dictate litigation strategy or to require that DOJ initiate court action on referred cases.[108] It does, however, decide how many and what types of cases to refer. Moreover, it can develop an understanding with DOJ whereby the agencies agree upon a litigation strategy and standards for cases to be referred. Several interagency meetings initiated by DOJ have resulted in concurrence on the desirability of a joint enforcement strategy but in only the five referrals cited above. The most recent meeting, in April 1980, resulted in an agreement to develop standards for referral of Title IX cases. However, as of mid-August, there had been no further communication on this issue.[109]

OCR and DOJ have been widely criticized for not cooperating effectively in enforcing Title IX.[110] Three joint investigations now underway represent a step toward closer interagency cooperation. Two are statewide investigations of Title VI and Title IX compliance in vocational education programs, one in Louisiana and the other in Connecticut. The third is an investigation of Michigan State University and will include review of possible discrimination in access to certain undergraduate programs, in scholarship awards, and in career guidance and counseling.[111]

TECHNICAL ASSISTANCE AND PUBLIC INFORMATION

HEW's Office of Education (OE) has funded most of the projects to assist administrators of education programs and Title IX coordinators in achieving voluntary compliance with the law--that is, in interpreting the Title IX regulations, conducting the required self-evaluation, and modifying their policies and practices to eliminate sex discrimination prior to any complaint investigation or compliance review. These include materials on implementing the regulations and achieving sex equity, workshops, conferences, a

communications network, and a sex desegregation assistance center in each HEW region.[112] A 3-year plan adopted in 1978 formally assigned OE this responsibility.[113] However, in proposing the plan OCR acknowledged that OE programs could provide only limited technical assistance in Title IX compliance until their authorizing legislation and regulations were revised, and OCR committed itself to assuring that adequate technical assistance was provided in the interim.[114] Nevertheless, through 1980 there were no OCR funds budgeted for Title IX technical assistance.[115]

Documents developed under OE auspices have been sent to OCR regional offices to copy and disseminate at their own discretion.[116] Moreover, regional offices were instructed to include information about the sex desegregation assistance center in their region in letters of findings and to send copies of those letters to the center. Thus, they were to inform institutions with compliance problems that those eligible could receive assistance, at no charge, upon request. However, not all regional offices have consistently followed these instructions.[117]

Several studies have indicated that adequate technical assistance, particularly in self-evaluation, can help promote voluntary compliance and in the long run reduce the enforcement burden. A recent study conducted for the Office of the Assistant Secretary for Education found that three of the four compliance "mechanisms" studied (appointment of a compliance coordinator, completion of a self-evaluation, and establishment of a grievance procedure) can contribute to positive changes in practices and attitudes required by Title IX and thus reduce reliance on direct Federal intervention to enforce the law. The study also found that "despite the potential importance of these four requirements, they have been virtually ignored by HEW civil rights officials."[118]

OCR has also not adhered to its commitment "to adopt procedures for systematic and public dissemination" of emerging Title IX policy.[119] In April 1978, acknowledging that the failure to make and disseminate policy had been "a major obstacle to effective civil rights enforcement," the OCR Director announced the inauguration of a "civil rights policy reporter" that would compile all policy interpretations

and guidelines and be available to the public, special interest groups, recipients of HEW assistance, and others, as well as to regional staff.[120] Various sources confirm the need for such a compendium,[121] but it has never been published. Only two issues of a less comprehensive bimonthly "digest" of policy-relevant case memoranda have been published, the latter covering the months of June and July 1979 and disseminated to 700 addressees.[122] As noted, there are approximately 20,000 recipients that could benefit from the guidance of the Title IX memoranda digested. In addition, there is an indefinitely large number of individuals and organizations whose concern with Title IX has been found a major factor in promoting voluntary compliance.[123]

CONCLUSION AND RECOMMENDATIONS

Past enforcement of Title IX has earned OCR severe criticism from many sources, including this Commission.[124] OCR has been very slow to issue important guidelines. It has been slow to process complaints. It has shown little commitment to discovering violations or to assisting institutions to prevent them.

Since 1977, when former Director David S. Tatel publicly recognized this history of nonenforcement,[125] OCR has taken steps to improve its performance. However, present means by which the agency can target and measure the effectiveness of its increased activity still appear inadequate. Even when the "case information management system" is fully automated and the "quality assurance project" augmented, the agency will not have sufficient data to estimate the extent of sex discrimination in education or evaluate its effectiveness in reducing it. Further, training, guidance, and monitoring to assure that policies and procedures determined at headquarters are properly and uniformly implemented in the regions also appear inadequate. The Title IX backlog is being reduced, but

there is evidence that not all cases are being investigated or closed properly. This report has noted other instances in which guidelines issued by headquarters have not been followed consistently. Finally, enforcement is still unduly slow. OCR has attempted to increase emphasis upon compliance reviews, but reviews planned for fiscal year 1980 are irretrievably behind schedule and reviews of athletics programs are beginning only 6 weeks before they originally were scheduled to conclude.

In view of the past history of nonenforcement and these persisting problems, the Secretary of Education should promptly and aggressively assert the Department's strong commitment to ending discrimination against women in education. A thorough review of the Title IX enforcement program should be among the Department's first priorities. In making a number of the improvements recommended below, the Department will also strengthen its other civil rights enforcement programs.

The following steps should be taken immediately:

1. Improve OCR's data collection and analysis capacity. The "case information management system"

appears potentially adequate to track cases and monitor compliance with the Adams order and perform certain necessary analyses. It does not, however, currently yield all data necessary to evaluate the status of Title IX compliance or the effectiveness of OCR's enforcement efforts.

a. Automation of the "case information management system" should be accelerated so that data on reasons for interruptions in the complaint investigation process and all data on the conduct and findings of compliance reviews are available.

b. The "case information management system" should be revised so that it will yield data necessary for analyses of the incidence of Title IX violations found and remedies achieved.

c. The "quality assurance project" should be augmented to permit identification of problems that particularly affect the handling of Title IX cases.

d. Additional data should be collected from recipient postsecondary institutions to identify disparities that may indicate discrimination on the basis of sex (and also race and handicap) in

financial assistance, student employment, nondegree-granting programs such as intercollegiate athletics, and services such as counseling and guidance, placement, health, and housing.

These data might include, for example, percentage of scholarship and other assistance monies awarded as compared to percentage of applicants for financial assistance by protected class, percentage of students employed by the institution and average hourly wage by protected class, percentage of students participating in key nondegree-granting programs and services and average per capita expenditure by program or service and protected class, and percentage of students placed and type of placement by protected class and type of preprofessional preparation (for example, degree earned).[126]

e. Data should be collected to permit an accurate accounting of the actual level of OCR staff effort devoted to Title IX enforcement.

2. Improve guidance and oversight of regional staff. Policies and procedures developed at headquarters are not always correctly and consistently

implemented in the regions. In some aspects of the Title IX enforcement program, faulty implementation appears systemic.

a. Staff training in special Title IX issues and compliance problems should be assessed and increased if necessary.

b. Additional guidelines should be issued to clarify the Title IX regulations and existing enforcement policy in such areas as rules of appearance and the scope of employment practices covered under subpart D ("Discrimination on the Basis of Sex in Education Programs and Activities").

c. Mechanisms for holding regional directors accountable for their staffs' handling of cases according to directives from headquarters, submitting all required reports, including "case disposition reports," and devoting a level of effort to Title IX commensurate with the commitments in the OCR budget should be assessed and strengthened if necessary.

3. Implement OCR policy on employment cases. Employment cases are not being handled in accordance

with guidelines issued in 1979, and plans for referring cases that cannot be processed are in abeyance.

a. Processing of complaints under subpart E ("Discrimination on the Basis of Sex in Employment") should be resumed in all districts in which court decisions have not prohibited enforcement.

b. Guidance and monitoring should be increased to assure that all employment complaints are thoroughly analyzed for possible processing under subpart D ("Discrimination on the Basis of Sex in Education Programs and Activities").

c. A memorandum of understanding to permit referral of all appropriate employment complaints to EEOC should be proposed again if a government-wide referral rule is not completed by December 1980.

4. Allocate staff resources necessary to complete planned compliance reviews on schedule. A significant proportion of compliance reviews scheduled have not been completed in past years, although compliance reviews are a more effective enforcement mechanism than complaint investigations. Elimination of the

intercollegiate athletics complaint backlog is dependent upon completion of compliance reviews.

a. The adequacy of staff resources should be reassessed in light of recent productivity figures and the demands of compliance reviews scheduled. Additional staff positions should be requested if necessary.

b. Possibilities of resolving more complaints in the context of compliance reviews should be explored.

c. The practice of scheduling more compliance reviews than can feasibly be completed within the fiscal year should be eliminated.

5. Initiate administrative proceedings to terminate funds in all cases in which voluntary negotiations do not resolve all violations found within 225 days after receipt of a complaint or 210 days after the beginning of a compliance review as required in the Adams order.

6. Increase cooperation with the Department of Justice (DOJ). Effective enforcement of Title IX depends in part upon referral and prosecution of cases. Inadequate communication and cooperation in the past

have resulted in few referrals and in refusals to act upon cases referred.

a. The number of joint investigations of possible noncompliance with Title IX should be increased.

b. OCR and DOJ should develop a comprehensive litigation strategy so that the two agencies agree upon the types of cases to be referred for prosecution. Specific plans to develop standards of referral and other mechanisms for cooperation and coordination, including systematic and timely communications between the agencies, should be developed and implemented at once.

7. Increase Title IX technical assistance and public information efforts. Inadequate assistance in understanding and implementing the Title IX regulations and policy guidelines has retarded voluntary compliance. OCR has not fulfilled its commitment to issuing a compendium of civil rights policy and systematically informing the public of developments in Title IX enforcement.

a. A "civil rights policy reporter" should be developed and published during fiscal 1981. It should include and cross-reference all documents

relevant to Title IX enforcement policy, as well as enforcement policy under Title VI and section 504, including regulations, policy interpretations, policy guidelines issued to regional staff, significant case memoranda, illustrative letters of findings, and briefs, and it should be updated quarterly.

b. Publication of the digest of significant case memoranda should be resumed at once and its availability communicated to all recipients of ED funds and the public.

NOTES

1. 20 U.S.C. §1681-86 (1977). A copy of the law, the HEW Title IX regulations, and a summary of its provisions are included in this report as appendices A, B, and C, respectively. The summary is reprinted, with updating, from U.S., Commission on Civil Rights, A Guide to Federal Laws and Regulations Prohibiting Sex Discrimination (revised July 1976).

2. 118 Cong. Rec. 5804 (1972). The Commission endorsed an earlier bill to prohibit discrimination against women in all federally assisted programs and in employment in education (H.R. 16098 § 805). See Frankie M. Freeman, Commissioner, U.S. Commission on Civil Rights, statement, Hearings Before the Special Subcommittee on Education of the Committee on Education and Labor, House of Representatives, 91st Congress, 2nd session (July 1, 1970), pp. 661-76.

3. 118 Cong. Rec. 5806-07, 5809-14 (1972).

4. U.S., Department of Labor, Bureau of Labor Statistics, Women in the Labor Force: Some New Data Series (1979), p. 1. In 1939 median earnings for women who worked year round, full time were $788, or 58 percent of the median for men. In 1977, the last year for which comparable data are available, the same group had median earnings of approximately $8,800, or 58.9 percent of the median for men. See also U.S., Commission on Civil Rights, Social Indicators of Equality for Minorities and Women (August 1978) and Women: Still in Poverty (July 1979), p. 18. The Commission also noted the effect of direct discrimination in employment.

5. Steiger, Fink, and Kosecoff, Inc., Vocational Education Equity Study, vol. II, Literature and Secondary Data Review (Palo Alto, Calif.: American Institutes for Research, 1979), p. 8.

6. Ibid., p. 10. See also "1978 Elementary and Secondary Schools Civil Rights Survey: Analysis of Selected Civil Rights Issues," vol. I, "Reports on Ranked Districts for the Nation" (July 1979) and

Project on Equal Education Rights, NOW Legal Defense and Education Fund, "Back-to-School Line-Up" (1979) (hereafter cited as Back-to-School). PEER found that the percentage of girls in interscholastic athletics had increased from 18 percent in 1972 to 33 percent in 1979, but that the percentage of girls enrolled in traditionally male vocational education programs had increased only from 6 percent to 11 percent during the same period.

7. Title IX Status in Region X (Olympia, Wash.: Miller and Associates, 1978), pp. 14, 35-36 (hereafter cited as Status in Region X). See also Michigan Department of Education, "The Report on a Review of Michigan School District Compliance with Title IX" (1979) and Back-to-School.

8. Under HEW's Title IX regulations and other agencies' regulations modeled on them, recipients are required to conduct a self-evaluation of their current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment in their education programs and activities; modify those that impermissibly discriminate on the basis of sex; and take remedial steps to eliminate discriminatory effects that may have resulted from past adherence to those policies and practices. Recipients are also required to file an assurance that their programs and activities are operated in compliance with Title IX, designate at least one employee to coordinate their compliance activities, adopt and publish grievance procedures for handling student and employee complaints of noncompliance, and give continuing public notification of their policy of nondiscrimination on the basis of sex (40 Fed. Reg. 24137 (1975)). For a full text of the HEW Title IX regulations, see appendix B.

9. 20 U.S.C. §1682 (1977).

10. National Advisory Council on Women's Educational Programs, Title IX, The Unenforced Law (1978).

11. Ibid., p. 1.

12. In May 1980 this responsibility, along with most of the education assistance programs administered by HEW, passed to the new Department of Education (ED). At the same time, the remainder of HEW became the Department of Health and Human Services (HHS). This report concerns Title IX enforcement prior to the opening of ED and therefore refers to the responsible department as HEW and, except as noted, to the Office for Civil Rights (OCR) as it existed in that department.

13. WEAL v. Weinberger, Civ. No. 74-1720 (D.D.C., filed Nov. 26, 1974), subsequently WEAL v. Califano. The suit also included a claim against the Department of Labor for failure to enforce Executive orders prohibiting discrimination on the basis of sex in educational institutions receiving Federal contract monies.

14. U.S., Commission on Civil Rights, The Federal Civil Rights Enforcement Effort--1974, vol III, To Ensure Equal Educational Opportunity (1975), p. 41 (hereafter cited as To Ensure Equal Educational Opportunity).

15. Project on Equal Education Rights, NOW Legal Defense and Education Fund, Stalled at the Start: Government Action on Sex Bias in the Schools (1978), p. 29.

16. Southeastern Public Education Program of the American Friends Service Committee, Almost As Fairly: The First Year of Title IX Implementation in Six Southern States (1977), p. 1.

17. Order, Adams v. Califano, Civ. No. 3095-70, and Weal v. Califano, Civ. No. 74-1720 (D.D.C., filed Dec. 29, 1977), pp. 1-4 (hereafter cited as Adams order).

18. Statement, HEW News, June 20, 1979.

19. Ibid.

20. Cynthia G. Brown, affidavit in Adams et al., Nov. 2, 1979 (hereafter cited as Adams affidavit), pp. 2,

20, 25-28. In an April 11, 1979, meeting with the Commissioners, representatives of the National Coalition for Women and Girls in Education stated that HEW's enforcement of Title IX had been "abysmal" (Meeting of U.S. Commission on Civil Rights, Apr. 11, 1979, transcript, p. 9).

21. 20 C.F.R. 9 §3401 (1979).

22. The Commission questionnaire elicited from HEW's OCR both specially prepared responses in a variety of forms and documents developed in conjunction with the agency's routine operations. All items provided in response to the questionnaire will be individually characterized.

23. Summary of OCR Statement of Organization, Functions, and Delegation of Authority prepared in response to Question 1, supplied in HEW, Office for Civil Rights, response to U.S. Commission Civil Rights Title IX Questionnaire, Feb. 8, 1980 (hereafter cited as HEW response); 43 Fed. Reg. 30927 (1978); Cynthia G. Brown, Assistant Secretary for Civil Rights, ED, letter to Louis Nunez, Staff Director, U.S. Commission on Civil Rights, Aug. 8, 1980 (hereafter cited as Brown letter). In ED the OCR headquarters unit fulfills the same functions under a different organization. Brown letter; Frank Till, Director, OCR Office for Special Concerns, ED, telephone interview, Aug. 12, 1980 (hereafter cited as Till interview).

24. Summary of OCR Statement of Organization, Functions, and Delegation of Authority prepared in response to Question 1, supplied in HEW response. Prior to the creation of ED, regional offices had divisions for elementary and secondary education, postsecondary education, and health and human development. ED's OCR regional offices retain the same structure, less the last of these divisions. The civil rights attorney units were established in 1978 to provide for the full-time involvment of civil rights attorneys in the day-to-day work of the agency. David S. Tatel, Director, Office for Civil Rights, "Recent Management Achievements of the Office for Civil

Rights," memorandum for the Secretary, Oct. 17, 1979 (hereafter cited as Management memorandum).

25. Office for Civil Rights, Status of FY 1977 Vacancies as of March 26, 1977-Revised and prepared response to Question 2, supplied in HEW response; Adams affidavit, pp. 3-4.

26. Adams affidavit, p. 3.

27. Prepared response to Question 3, supplied in HEW response. Most staff also have responsibilities for Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000(d) (1976), and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (1976).

28. Office for Civil Rights, Status of Positions, 1/12/80, supplied in HEW response; Adams affidavit, pp. 3-4. Staff had been increased to 1,949 in July 1979. As of January 1980, staff was at 90 percent of the congressionally authorized staffing ceiling (ibid.). OCR states that the Department's fiscal 1980 budget request for a reduction of 121 OCR positions was made possible by increased efficiency in processing complaints (Brown letter). The 1979 case closure rate has not been sustained in 1980. As of June 30, 1980, the case closure rate was 5.8, and to that point in the fiscal year, it had never risen above 6.2. Joseph Boyette, Chief, OCR Reports and Analysis Branch, ED, telephone interview, Aug. 12, 1980. Moreover, of the 256 compliance reviews scheduled for fiscal 1980, 190 had not been started and only 2 had been closed as of June 30 (ibid.).

29. Office for Civil Rights, location of Vacancies, 1/31/80, supplied in HEW response. There were 57 vacancies in OCR headquarters offices and 41 in the Chicago regional office. These figures are based upon the congressionally authorized staffing ceiling.

30. The Office of Compliance and Enforcement oversees the day-to-day conduct of compliance reviews, complaint investigations, and other enforcement activities. It provides for the preparation and distribution of manuals containing case-related procedural guidelines;

ensures that regulations, guidelines, and standards are implemented in a uniform, effective, and timely manner; establishes and implements systems to control the quality of enforcement; and serves as the focal point for directing and coordinating the enforcement activities of the regional offices. 43 Fed. Reg. 40929 (1978).

31. Prepared response to Question 3, supplied in HEW response.

32. FY 1981 OCR Funding Level by Activity and Area of Discrimination, supplied in HEW response. A staff resource is a measure of effort equivalent to one staff member's working full time for a year and does not designate the number of staff members who will be involved.

33. Deborah Hollinger, Assistant to the Executive Assistant to the Director, OCR, telephone interview, Apr. 1, 1980.

34. Mariea Cromer, Special Assistant to the Director, OCR, telephone interview, Apr. 1, 1980.

35. Prepared response to Question 6, supplied in HEW response. By contrast, between February and August 1979 approximately 1,000 OCR staff received training in the requirements of the section 504 regulations (Adams affidavit, p. 19).

36. Prepared response to Question 6, supplied in HEW response.

37. Ibid.; U.S., Department of Health, Education, and Welfare, Office for Civil Rights, "Title IX Intercollegiate Athletics Training," Mar. 3-7, 1980.

38. Helen Walsh, OCR representative on the HEW Intercollegiate Athletics Task Force, interview, Mar. 25, 1980 (hereafter cited as Walsh interview). The Intercollegiate Athletics Task Force, headed by HEW (now HHS) General Counsel Joan Z. Bernstein, was established to coordinate OCR efforts to enforce the agency's newly clarified athletics policy.

39. Helen Walsh, telephone interviews, May 16, 1980, and July 22, 1980.

40. 20 U.S.C. §1682 (1976).

41. Elmer Staats, Comptroller General of the United States, letter to Senator Birch Bayh, Mar. 30, 1977.

42. The Comptroller General's letter listed 14 items for which the "case following system" then in use could not provide data. Despite its improvements over that system, the "case information management system" also cannot provide data on the number of cases referred to EEOC and their final disposition or other data sufficient to measure "the extent that the problem of discrimination in federal financial assistance programs has been reduced as a direct result of OCR's enforcement activities," both deficiences in the "case following system" noted in the Comptroller General's letter.

43. Roma J. Stewart, Director, Office for Civil Rights, HEW, letter to Louis Nunez, Staff Director, U.S. Commission on Civil Rights, Feb. 8, 1980 (hereafter cited as Stewart letter).

44. OCR states that the information requested by the Commission to develop such a profile could have been extracted from individual case records and regional office files, but that "this would have been time consuming and an inefficient use of resources" (Brown letter).

45. Joseph Boyette, telephone interview, June 3, 1980. For example, data on reasons for interruptions in complaint investigations are not yet automated.

46. Ibid.

47. Stewart letter; Joseph Boyette, telephone interview, Aug. 12, 1980.

48. John Hodgdon, Acting Director, Office of Management and Administration, HEW, interview, Mar. 25, 1980.

49. Jerold D. Ward, OCR Quality Assurance Project, telephone interview, Apr. 14, 1980.

50. Michael O'Grady, Acting Chief, OCR Data Analysis Section, ED, telephone interview, June 3, 1980 (hereafter cited as O'Grady interview). Title IX items include enrollment in vocational education and physical education courses and in interscholastic athletics programs.

51. Ibid.; prepared response to Question 14, supplied in HEW response. OCR has acknowledged that it does not yet have a method for systematically targeting compliance reviews of postsecondary institutions (O'Grady interview). However, the agency also notes that survey data are only one of the factors used to target compliance reviews and that it has conducted postsecondary reviews in areas not covered by those data (Brown letter).

52. Prepared response to Question 15, supplied in

HEW response. Complaints on hand at the beginning of fiscal 1980 included 261 backlog and carryover complaints. Most of these involved athletics and rules of appearance, which had been held in abeyance pending policy clarification, and employment, which OCR deemed impossible to process due to "adverse court decisions" (Adams affidavit, p. 19).

53. OCR received 829 Title IX complaints in 1977, 755 in 1978, and 728 in 1979 (Prepared response to Question 14, supplied in HEW response).

54. Management memorandum. These are data for complaints filed under all OCR enforcement programs combined.

55. Joseph Boyette, telephone interview, Aug. 12, 1980. According to Mr. Boyette, various factors combined to make the fiscal 1979 productivity rate, which was used to justify the OCR staff reduction, atypically high.

56. Adams affidavit, p. 11.

57. Prepared response to Question 20, supplied in HEW response. The normal processing time for complaints specified in the Adams order is 225 days (Adams order, pp. 13-14).

58. Prepared response to Question 18, supplied in HEW response.

59. Adams affidavit, p. 2. Of the 360 backlogged complaints not resolved as required by the consent decree, 200 involved these three areas.

60. Subpart D generally provides that "no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination" in any recipient education program or activity. 40 Fed. Reg. 21140 (1975). For the full text of the provision, see appendix B. OCR has interpreted subpart D as requiring that "education services be provided to students...in an environment free of sex discrimination." Cynthia G. Brown, Deputy Director, Office of Compliance and Enforcement, memorandum to Regional Directors, July 4, 1979 (hereafter cited as Brown memorandum).

61. HEW had petitioned the Supreme Court to review Islesboro School Committee v. Califano, 593 F.2d 424 (1st Cir. 1979), Romeo Community Schools v. HEW, 600 F.2d 581 (6th Cir. 1979), and the Junior College District of St. Louis v. Califano, 597 F.2d 119 (8th Cir. 1979). Nearly half of the complaint backlog at the end of fiscal 1979 consisted of employment complaints that OCR did not believe could be processed under subpart D (Brown letter). See below for discussion of the analysis of employment complaints.

62. Adams affidavit, p. 22.

63. Francesta E. Farmer, Director, Office of Interagency Coordination, Equal Employment Opportunity Commission, telephone interview, Apr. 15, 1980 (hereafter cited as Farmer interview). In December 1978, OCR approached EEOC proposing to conclude a memorandum of understanding whereby OCR would refer all employment cases to EEOC. OCR could not specify how

many Title IX complaints were immediately involved. EEOC has declined to conclude a memorandum of understanding until it and the Department of Justice complete a government-wide rule whereby EEOC will process all individual complaints and granting agencies will process complaints involving programs funded to provide employment and complaints involving systemic discrimination. Many, but not all, future Title IX employment complaints may then be referred to EEOC. The fate of the complaints now on hand will be dependent upon the development of a mechanism, such as a retrospective rule modeled upon the new rule in process, whereby EEOC can accept employment cases that would otherwise be untimely. Joseph Esquibel, Director, Regulations and Standards Division, Office of Interagency Coordination, EEOC, doubts that his agency will be able to accept more than a small minority of the cases, because most will be defective by EEOC rules and therefore subject to dismissal were the agency to bring suit (telephone interview, May 23, 1980). Till interview.

64. 100 S.Ct. 467 (1979). Subpart E prohibits discrimination in employment in education programs and activities. 40 Fed. Reg. 24143 (1975). For the full text of this subpart, see appendix B. Under the appellate rulings, OCR may still regulate employment practices in education programs the principal purpose of whose Federal funds is to provide employment and employment practices that can adversely affect students (Brown memorandum).

65. Roma J. Stewart, memorandum to Regional Directors, Dec. 13, 1979; Brown memorandum. The first circuit includes Maine, New Hampshire, Massachusetts, Puerto Rico, and Rhode Island. The sixth circuit includes Michigan, Ohio, Kentucky, and Tennessee. The eighth circuit includes North Dakota, South Dakota, Nebraska, Minnesota, Iowa, and Missouri. In most other States, OCR could have continued to enforce subpart E. Instead, it decided to curtail its enforcement efforts to cases analogous to those it is authorized to handle under Title VI.

66. Stewart letter; Brown memorandum.

67. Barbara Stein, National Education Association, memorandum to U.S. Civil Rights Commission, Mar. 20, 1980. Plaintiffs in WEAL v. Califano, including NEA, received permission from the court to review OCR closures of employment cases. The findings shared with this Commission are preliminary findings. They are based upon reviews of case files, which are supposed to contain all documents collected and prepared in connection with the case. Civil rights attorneys in the regional offices are responsible for analyzing employment complaints for possible processing under subpart D. When a file contained no memorandum from a civil rights attorney, the inference was drawn that no such analysis was performed.

68. Grace Mastalli, Associate Director, Project on the Status and Education of Women, telephone interview, Apr. 11, 1980 (hereafter cited as Mastalli interview). Headquarters officials stated that they would remand the cases to the regions for reopening.

69. Dougherty County School System v. Harris, No. 78-3384 (5th Cir. July 28, 1980); Seattle University v. HEW, No. 78-1746 (9th Cir. July 19, 1980); North Haven Board of Education v. Hufstedler, Trumbull Board of Education v. ED and Linda Potz, Nos. 1022-24 (2d Cir. July 25, 1980).

70. Till interview.

71. Ibid.

72. Brown memorandum. Complainants who did not originally file under Title VII may subsequently do so if the discrimination is ongoing or they allege a mistaken filing (Farmer interview).

73. 44 Fed. Reg. 71413 (1979); 43 Fed. Reg. 66626 (1979). The Commission commented extensively on the proposed intercollegiate athletics policy. U.S., Commission on Civil Rights, Comment on a Proposed Policy Interpretation of Title IX of the Education Amendments of 1972 (rev. September 1979).

74. HEW Fact Sheet, Dec. 4, 1979. OCR states that an inhouse task force on intercollegiate athletics was established in March 1978, "well before the transition period ended on July 21." The agency also states that investigations of intercollegiate athletics complaints were conducted throughout the transition period and that only formal notices of the findings were held in abeyance (Brown letter). These investigations cannot be used as the basis for letters of findings now because they are no longer timely and in many instances were not conducted according to the present intercollegiate athletics policy (Helen Walsh, telephone interview, Aug. 12, 1980).

75. 43 Fed. Reg. 58070 (1978).

76. Walsh interview; Mariea Cromer, telephone interview, May 16, 1980.

77. Helen Walsh, telephone interview, Aug. 12, 1980.

78. Walsh interview. Changes in athletics programs since many of the complaints were filed necessitate this method of resolution (Mariea Cromer, telephone interview, May 16, 1980).

79. Helen Walsh, telephone interview, Aug. 12, 1980. For a more extensive treatment of the impact of Title IX on women's participation in intercollegiate athletics and HEW's intercollegiate athletics policy, see U.S., Commission on Civil Rights, More Hurdles to Clear (1980).

80. 43 Fed. Reg. 58076 (1978).

81. 44 Fed. Reg. 66626 (1979).

82. Mariea Cromer, telephone interview, Apr. 1, 1980.

83. Stewart letter.

84. Prepared response to Question 16, supplied in HEW response.

85. In 1977 and 1978, 51 percent of all cases were closed with "relief" to the complainant. As of August 1979, the proportion had risen to 54 percent (Management memorandum).

86. Prepared response to Question 22, supplied in HEW response.

87. Adams order, p. 8, attachment A; Adams affidavit, pp. 25-28.

88. Prepared response to Question 23, supplied in HEW response.

89. Adams affidavit, pp. 27-28.

90. FY 1980 Annual Operating Plan--Education Compliance Review Issues, OCR (unpublished revision) (hereafter cited as Operating Plan).

91. Ibid.; Management memorandum.

92. Operating Plan. OCR does not tabulate interim data on the status of compliance reviews by issue or type of program and therefore could not specify how many of these reviews were in progress as of August 1980 (Joseph Boyette, telephone interview, Aug. 12, 1980).

93. Adams affidavit, pp. 27-28.

94. Walsh interview. As noted, these reviews are not scheduled to commence until guidelines, including the athletics manual, have been completed.

95. Mariea Cromer, telephone interview, Apr. 2, 1980. As noted, of the 256 reviews scheduled for fiscal 1980, 190 had not been started as of June 30. As of the same date, 54 of the reviews scheduled for fiscal 1979 had not been started and an additional 112 had been started but not closed. Thirty-five reviews started in fiscal 1978 also remained unclosed (Joseph Boyette, telephone interview, Aug. 12, 1980).

96. 20 U.S.C. §1682 (1977).

97. Prepared response to Question 25, supplied in HEW response.

98. Chart and summary prepared in response to Question 27, supplied in HEW response.

99. Brown letter.

100. Ibid.

101. Till interview.

102. To Ensure Equal Educational Opportunity, pp. 127-31; Center for National Policy Review, Justice Delayed and Denied (1974); National Coalition for Women and Girls in Education, letter to Shirley Hufstedler, Secretary, ED, Apr. 11, 1980; Leadership Conference on Civil Rights, letter to Shirley M. Hufstedler, Apr. 18, 1980; Bernice Sandler, director, Project on the Status and Education of Women, telephone interview, Apr. 10, 1980.

103. To Ensure Equal Educational Opportunity, p. 303. This finding raises questions regarding the sufficiency of the voluntary agreements concluded to resolve Title IX compliance problems. Recent regional visits conducted by PEER also raised such questions (Linda Weston, associate director, PEER, telephone interview, June 6, 1980).

104. Status in Region X, p. 29.

105. Benjamin R. Civiletti, Attorney General, letter to Patricia Roberts Harris, Secretary, HEW, Nov. 13, 1979.

106. Ibid.

107. Prepared response to Question 28, supplied in HEW response; Robert Reinstein, Chief, General Litigation Section, Civil Rights Division, Department of Justice, telephone interview, Mar. 19, 1980 (hereafter cited as Reinstein interview). In two cases DOJ did not proceed because the Department of Labor was filing suit under the Equal Pay Act. DOJ did not consider the evidence sufficient in the third case, and it considered the

impact of the relief to be obtained in the fourth too limited to justify the resources necessary to prosecute. In the fifth case DOJ was unwilling to proceed until HEW's jurisdiction under subpart E was decided by the courts (Prepared response to Question 28, supplied in HEW response). Since May 1979, when the Supreme Court ruled, in Cannon v. University of Chicago, 99 S.Ct. 1946 (1979), that Title IX includes a right of private action, DOJ has intervened in private Title IX cases. DOJ is currently studying a sixth referred case (on medical school admissions) for possible action (Reinstein interview).

108. Brown letter.

109. John Huerta, Deputy Assistant Attorney General, DOJ, telephone interview, Aug. 11, 1980.

110. Marcia Greenberger, WEAL counsel in WEAL v. Califano, interview, Feb. 2, 1980; Karen Czapanskiy, co-chair, legislation and issues committee, Women's Bar Association, telephone interview, Apr. 30, 1980; Mastalli interview. In a March 24, 1980, interview, Cynthia G. Brown, then head of the Civil Rights Task Force, ED transition team, acknowledged that there was legitimacy in this criticism.

111. Reinstein interview.

112. The sex desegregation assistance centers were established with funds available under Title IV of the Elementary and Secondary Education Act, 20 U.S.C. §1821(1976), to assist public school districts in meeting the requirements of Title IX and achieving sex equity. In accordance with the Title IV regulations, 43 Fed. Reg. 32383 (1978), assistance must be initiated by a letter from the district superintendent. It is provided without charge. Funds to promote sex equity have also been regularly provided by the National Institute of Education and the WEAA program. The latter, as reauthorized, may focus funding on Title IX compliance projects. 20 U.S.C. 3341 (1979). Leslie Wolfe, Director, WEAA, telephone interview, Apr. 9, 1980.

113. David S. Tatel, Director, Office for Civil Rights, memorandum to the Secretary, Proposed Three Year Plan for Civil Rights Activities in POC's, June 9, 1978.

114. Ibid.

115. Calvin Mitchell, budget analyst, OCR, telephone interview, Apr. 1, 1980. The OCR 1981 budget request includes $1.6 million for Title IX technical assistance. The total OCR budget request for technical assistance is $9.98 million.

116. Lloyd R. Henderson, Director, Elementary and Secondary Education Division, Office of the Secretary, HEW, memorandum to Directors, Office for Civil Rights (Regions I-X) and others, June 9, 1976.

117. Rosa Wiener, OCR Standards, Policy, and Research Administration, Division of Standards and Policy Development, Sex Discrimination Branch, HEW, interview, Mar. 24, 1980.

118. Paul T. Hill and Richard Rettig, Mechanisms for the Implementation of Civil Rights Guarantees by Educational Institutions (Palo Alto, Calif.: Rand Center for Research on Education Finance and Governance, 1980) (hereafter cited as Mechanisms for Implementation). The fourth "mechanism" or requirement, filing an assurance of compliance, was found ineffective, at least in part because the assurance had to be filed before many recipients had conducted their self-evaluation.

119. David s. Tatel, Statement, HEW News, Apr. 27, 1978.

120. Ibid. Under the Administrative Procedures Act, OCR is required to complete and publish quarterly at least an index of all policy-relevant documents. 5 U.S.C. §552(a)(2)(1977).

121. Bernice Sandler, director, and Grace Mastalli, associate director, Project on the Status and Education of Women, interview, Dec. 12, 1979; Status in Region IX.

122. Mary Lou Watkins, Office of Public Affairs, OCR, telephone interview, Mar. 14, 1980.

123. Mechanisms for Implementation; Status in Region X.

124. To Ensure Equal Educational Opportunity, pp. 220-26, 358-59.

125. Statement, HEW News, June 20, 1979.

126. The above are offered only to exemplify the kinds of data that would be useful in assessing the compliance of postsecondary institutions.

APPENDIX A
EDUCATION AMENDMENTS OF 1972
PUBLIC LAW 92-318, 92nd CONGRESS, S.659
JUNE 23, 1972

TITLE IX—PROHIBITION OF SEX DISCRIMINATION

SEX DISCRIMINATION PROHIBITED

SEC. 901. (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

Exceptions.

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) in regard to admissions to educational institutions, this section shall not apply (A) for one year from the date of enactment of this Act, nor for six years after such date in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine; and

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(b) Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

Definition.

(c) For purposes of this title an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

FEDERAL ADMINISTRATIVE ENFORCEMENT

SEC. 902. Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Report to congressional committees.

JUDICIAL REVIEW

SEC. 903. Any department or agency action taken pursuant to section 1002 shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 902, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, United States Code, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.

86 STAT. 375

80 Stat. 392.
5 USC 701.

PROHIBITION AGAINST DISCRIMINATION AGAINST THE BLIND

SEC. 904. No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity, but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment.

EFFECT ON OTHER LAWS

SEC. 905. Nothing in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

AMENDMENTS TO OTHER LAWS

78 Stat. 246, 266.

SEC. 906. (a) Sections 401(b), 407(a)(2), 410, and 902 of the Civil Rights Act of 1964 (42 U.S.C. 2000c(b), 2000c-6(a)(2), 2000c-9, and 2000h-2) are each amended by inserting the word "sex" after the word "religion".

75 Stat. 71.
77 Stat. 56.
29 USC 206.

(b)(1) Section 13(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)) is amended by inserting after the words "the provisions of section 6" the following: "(except section 6(d) in the case of paragraph (1) of this subsection)".

80 Stat. 831.

(2) Paragraph (1) of subsection 3(r) of such Act (29 U.S.C. 203(r)(1)) is amended by deleting "an elementary or secondary school" and inserting in lieu thereof "a preschool, elementary or secondary school".

(3) Section 3(s)(4) of such Act (29 U.S.C. 203(s)(4)) is amended by deleting "an elementary or secondary school" and inserting in lieu thereof "a preschool, elementary or secondary school".

INTERPRETATION WITH RESPECT TO LIVING FACILITIES

SEC. 907. Notwithstanding anything to the contrary contained in this title, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

APPENDIX B
HEW TITLE IX REGULATIONS

PART 86—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

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SOURCE: 40 FR 24128, June 4, 1975, unless otherwise noted.

Subpart A—Introduction

§ 86.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93–568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682, as amended by Pub. L. 93–568, 88 Stat. 1855, and Sec. 844, Education Amendments of 1974, 88 Stat. 484, Pub. L. 93–380)

§ 86.2 Definitions.

As used in this part, the term—

(a) *"Title IX"* means title IX of the Education Amendments of 1972, Pub. L. 92–318, as amended by section 3 of Pub. L. 93–568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(b) *"Department"* means the Department of Health, Education, and Welfare.

(c) *"Secretary"* means the Secretary of Health, Education, and Welfare.

(d) *"Director"* means the Director of the Office for Civil Rights of the Department.

(e) *"Reviewing Authority"* means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this part.

(f) *"Administrative law judge"* means a person appointed by the reviewing authority to preside over a hearing held under this part.

(g) *"Federal financial assistance"* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) *"Recipient"* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

(i) *"Applicant"* means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(j) *"Educational institution"* means a local educational agency (L.E.A.) as defined by section 801(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 881), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (k), (l), (m), or (n) of this section.

(k) *"Institution of graduate higher education"* means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(l) *"Institution of undergraduate higher education"* means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward

a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(m) *"Institution of professional education"* means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the United States Commissioner of Education.

(n) *"Institution of vocational education"* means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

(o) *"Administratively separate unit"* means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(p) *"Admission"* means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(q) *"Student"* means a person who has gained admission.

(r) *"Transition plan"* means a plan subject to the approval of the United States Commissioner of Education pursuant to section 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.3 Remedial and affirmative action and self-evaluation.

(a) *Remedial action.* If the Director finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Director deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of the effective date of this part:

(i) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity;

(ii) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(iii) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the Director upon request, a description of any modifications made pursuant to paragraph (c)(ii) of this section and of any remedial steps taken pursuant to paragraph (c)(iii) of this section.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[40 FR 21428, June 4, 1975; 40 FR 39506, Aug. 28, 1975]

§ 86.4 Assurance required.

(a) *General.* Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Director, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Director if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 86.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Director of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.5 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of Subpart B of this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.6 Effect of other requirements.

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 799A and 845 of the Public Health Service Act (42 U.S.C. 295h–9 and 298b–2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(Secs. 901, 902, 905, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1685)

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives or benefits from Federal financial assistance.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.7 Effect of employment opportunities.

The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.8 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at

least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.9 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities which it operates, and that is required by title IX and this part not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the Director finds necessary to apprise such persons of the protections against discrimination assured them by title IX and this part, but shall state at least that the requirement not to discriminate in education programs and activities extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of title IX and this part to such recipient may be referred to the employee designated pursuant to § 86.8, or to the Director.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in: (i) Local newspapers; (ii) newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and (iii) memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form which it makes available to any person of a type described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and require such representatives to adhere to such policy.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart B—Coverage

§ 86.11 Application.

Except as provided in this subpart, this Part 86 applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance.

§ 86.12 Educational institutions controlled by religious organizations.

(a) *Application.* This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) *Exemption.* An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Director a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.13 Military and merchant marine educational institutions.

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.14 Membership practices of certain organizations.

(a) *Social fraternities and sororities.* This part does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls.* This part does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts and Camp Fire Girls.

(c) *Voluntary youth service organizations.* This part does not apply to the membership practices of voluntary youth service organizations which are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954 and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; Sec. 3(a) of P.L. 93-568, 88 Stat. 1862 amending Sec. 901)

§ 86.15 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by this part.

(b) *Administratively separate units.* For the purposes only of this section, §§ 86.16 and 86.17, and Subpart C, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of Subpart C.* Except as provided in paragraphs (d) and (e) of this section, Subpart C applies to each recipient. A recipient to which Subpart C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients which are educational institutions, Subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[40 FR 21428, June 4, 1975; 40 FR 39506, Aug. 28, 1975]

§ 86.16 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which Subpart C applies which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of Subpart C unless it is carrying out a transition plan approved by the United States Commissioner of Education as described in § 86.17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.17 Transition plans.

(a) *Submission of plans.* An institution to which § 86.16 applies and which is composed of more than one administratively separate unit may submit either

a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the United States Commissioner of Education, a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes, as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which § 86.16 applies shall result in treatment of applicants to or students of such recipient in violation of Subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 86.16 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs which emphasize the institution's commitment to enrolling students of the sex previously excluded.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[40 FR 21428, June 4, 1975; 40 FR 39506, Aug. 28, 1975]

§ 86.18–86.20 [Reserved]

Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

§ 86.21 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§ 86.16 and 86.17.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this Subpart applies shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss" or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.22 Preference in admission.

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.23 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 86.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 86.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 86.24–86.30 [Reserved]

Subpart D—Discrimination on the Basis of Sex in Education Programs and Activities Prohibited

§ 86.31 Education programs and activities.

(a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which Subpart C does not apply, or (2) an entity, not a recipient, to which Subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Discriminate against any person in the application of any rules of appearance;

(6) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(7) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(8) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient edu-

cational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided*, a recipient educational institution which administers or assists in the administration of such scholarships, fellowship, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Programs not operated by recipient.* (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient;

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activtiy takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.32 Housing.

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole: (i) Proportionate in quantity and (ii) comparable in quality and cost to the student. A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

(Secs. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1686)

§ 86.33 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374)

§ 86.34 Access to course offerings.

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(a) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(c) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(d) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.

(e) Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(f) Recipients may make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.35 Access to schools operated by L.E.A.s.

A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by such recipient; or

(b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

(Sections 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.36 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

§ 86.37 Financial assistance.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not: (1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate; (2) through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or (3) apply any rule or assist in application of any rule concerning eligibility for such

assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) a recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided*, that the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in subparagraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under subparagraph (b)(2)(i) of this paragraph; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 86.41.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

[40 FR 21428, June 4, 1975; 40 FR 39808, Aug. 28, 1975]

§ 86.38 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall not do so in a manner which violates Subpart E of this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.39 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate Subpart E of this part if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.40 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipent shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation in the normal education program or activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the instructional program in the separate program is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as

expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

[40 FR 21428, June 4, 1975; 40 FR 39506, Aug. 28, 1975]

§ 86.42 Textbooks and curricular material.

Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.43–86.50 [Reserved]

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited

§ 86.51 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this Subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) *Application.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.52 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.53 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.54 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.55 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in § 86.61.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[40 FR 21428, June 4, 1975; 40 FR 39506, Aug. 28, 1975]

§ 86.56 Fringe benefits.

(a) *"Fringe benefits" defined.* For purposes of this part, "fringe benefits" means: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of § 86.54.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal conrtibutions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.57 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary dis-

ability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.58 Effect of State or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits.* A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.59 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a *bona-fide* occupational qualification for the particular job in question.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.60 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss or Mrs."

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.61 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 86.62–86.70 [Reserved]

Subpart F—Procedures [Interim]

§ 86.71 Interim procedures.

For the purposes of implementing this part during the period between its effective date and the final issuance by the Department of a consolidated procedural regulation applicable to title IX and other civil rights authorities administered by the Department, the procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 45 CFR 80–6—80–11 and 45 CFR Part 81.

APPENDIX C
TITLE IX OF THE EDUCATION AMENDMENTS OF 1972---A SUMMARY

Most educational institutions across the United States receive Federal financial assistance. These include preschool programs, elementary and secondary school systems, 4-year colleges and universities, vocational and technical schools, 2-year community and junior colleges, and graduate and professional schools. Title IX of the Education Amendments of 1972 and ED's Title IX regulations prohibit educational institutions that receive Federal funds from discrmininating on the basis of sex.

COVERAGE

This prohibition covers educational programs, employment, health benefits, housing, athletics, admissions, and financial aid and most other programs and services of the institution. Military schools and schools operated by religious organizations whose tenets are inconsistent with the provisions of Title IX are exempt from coverage.

Vocational, professional, graduate, and public undergraduate schools may not discriminate on the basis of sex in admissions. However, private undergraduate schools, schools that have traditionally admitted only individuals of one sex, and public and private preschools and elementary and secondary schools (except where such schools are vocational) are exempt from the provisions with regard to admissions only. Schools that are in transition from single-sex to coeducational institutions are allowed 7 years to complete the process, during which they may continue to make admissions decisions on the basis of sex.

Examples of discrimination forbidden by these amendments include: refusal of a board of education to hire or promote qualified women as principals in the school system, refusal of a college to provide housing of comparable quality and cost to students of both sexes, and maintenance of sex-segregated classes in business, vocational, technical, home economics, music, and adult education courses or programs.

WHAT IS REQUIRED

An education program or activity receiving Federal funds must afford employees, students, and potential employees and students equal employment opportunity and equal opportunity to participate in and receive the benefits of all educational programs and activities, without regard to sex.

Specific obligations include the following:

All educational institutions are required to refrain from sex discrimination (except as otherwise noted). Where the Assistant Secretary of ED's Office for Civil Rights finds that an institution has discriminated on the basis of sex in an education program or activity, the institution must take remedial action to overcome the effects of such discrimination. However, in the absence of a determination of prior acts of discrimination based on sex, the institution is not required to act affirmatively to overcome limited participation by persons of a particular sex, although it may choose to do so.

Generally, institutions may not utilize tests, counseling, or recruiting methods that have a disproportionately adverse effect on persons on the basis of sex, either for admission to programs or

activities or for employment. In admissions, testing or counseling materials may be different for males and females if they cover the same interest areas and occupations and the use of such different materials is shown to be essential to eliminate sex bias. In employment, testing may be different for males and females if it is shown to be valid in predicting successful performance and if alternatives are unavailable. Recruitment of members of one sex may be used remedially to overcome the effects of past discrimination, but may not otherwise be used if it has a discriminatory effect.

Institutions may provide separate housing based on sex, but may not impose different rules, fees, or requirements or provide different benefits to one sex. Housing for women and men must be comparable in quality and cost and proportionate in quantity to the number of students of each sex applying for it.

Institutions may provide separate toilet, locker room, and shower facilities on the basis of sex, but the facilities provided for students of one sex must be comparable to those provided for students of the other sex.

The use of particular textbooks and other curricular materials is not prohibited by Title IX, regardless of content. However, courses, programs, and activities may not be segregated by sex except in the case of choruses with vocal range requirements resulting in a single-sex chorus, courses on human sexuality on the elementary and secondary level, body contact sports, and certain specific extracurricular activities such as father-son and mother-daughter events and Boys State and Nation and Girls State and Nation conferences sponsored by the American Legion. Also exempt from Title IX coverage are the membership practices of social fraternities and sororities with tax-exempt status, voluntary youth organizations that have traditionally limited membership to persons of one sex under the age of 19, and scholarships awarded by pageants restricted to one sex, provided that the pageants assess poise and talent, as well as personal appearance, and do not violate other nondiscrimination laws.

Physical education programs on the elementary level were required to be integrated by July 21, 1976, and those above the elementary level by July 21, 1978.

Separate athletic teams may be maintained for sports involving competitive skills and body contact. For noncontact sports only, if no separate team for a particular sport exists for one sex and previous opportunities were limited for that sex to participate, all persons must be permitted to try out for the existing team. Teams for contact sports may remain single sex, even if no team is available for the excluded sex. Instititions are permitted to make unequal aggregate and per capita expenditures for members of each sex on a team or for separate male and female teams so long as this does not interfere with equality of opportunity for members of each sex. Necessary funds must be provided for teams for each sex.

COMPLAINTS

Each institution must adopt and publish complaint procedures and designate at least one employee to carry out its Title IX responsibilities, including investigation of complaints. The institution must notify all students and employees of the appointed employee's name, office address, and telephone number.

In addition, a complaint may be filed with the Office for Civil Rights of the Department of Education by any person (or a representative) who believes herself or himself or either sex as a class to be subjected to discrimination prohibited by Title IX. The written complaint should be filed with the regional director of the Office for Civil Rights, Department of Education. There are regional offices in Boston, New York City, Philadelphia, Atlanta, Chicago, Dallas, Kansas City (Missouri), Denver, and Seattle. Complaints must be filed within 180 days of the alleged discrimination, but ED may extend this deadline.

The Department of Education may investigate where a complaint has been made or where there are other indications that the educational institution is discriminating on the basis of sex. ED will informally attempt to bring the institution into compliance with the requirements of Title IX. Once a complaint has been filed, the complainant is no longer involved, and it is the responsibility of ED to resolve it.

ENFORCEMENT AND SANCTIONS

In addition to investigations initiated by a complaint, ED may conduct periodic compliance reviews. Where an educational institution is found to be discriminating on the basis of sex and ED finds that this cannot be corrected informally, it may terminate or refuse to grant funds to the institution. Before such action may be taken, ED must allow an opportunity for a hearing and must find that there will not be voluntary compliance with the nondiscrimination requirements. In addition, ED may refer the matter to the Attorney General of the United States with a recommendation that legal action be taken or take any other action authorized by law.

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Title IX is the subject of another publication of the U.S. Commission on Civil Rights. Single copies of More Hurdles to Clear---Women and Girls in Competitive Athletics, July 1980, 87 pp., are available from:

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